

IN THE  
COURT OF APPEALS OF VIRGINIA

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RECORD NOS. 0313, 0314 & 0317-23-3

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BRIAN DAVID HILL,

*Appellant,*

v.

COMMONWEALTH OF VIRGINIA,

*Appellee.*

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BRIEF OF THE COMMONWEALTH

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JASON S. MIYARES  
Attorney General of Virginia

JUSTIN B. HILL  
Assistant Attorney General  
Virginia Bar No. 93564

OFFICE OF THE ATTORNEY GENERAL  
202 North Ninth Street  
Richmond, Virginia 23219  
(804) 786-2071 phone  
(804) 371-0151 fax  
oagcriminallitigation@oag.state.va.us

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**BRIEF OF THE COMMONWEALTH**

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**STATEMENT OF THE CASE**

These cases arise from three judgments of the Circuit Court for the City of Martinsville. Brian David Hill was convicted of misdemeanor indecent exposure in 2018 and sentenced to 30 days in jail. (R. 1–2). In 2023, Hill filed a motion to set aside his conviction pursuant to Code § 8.01-428. As in his four other pending appeals and myriad of prior post-conviction filings, he claims that his conviction was tainted by fraud. The trial court denied his motion and his subsequent motion to reconsider.

The trial court properly denied Hill's motions. Hill fails to allege a *prima facie* case of extrinsic fraud. He likewise failed to institute an independent action as Code § 8.01-428 requires. Therefore, this Court should affirm.

## **STATEMENT OF FACTS**

### **I. Hill is convicted of indecent exposure.**

On September 21, 2018, Sergeant Jones of the Martinsville Police Department responded to a report of a naked white male running from Church Street to Hooker Street. (R. 3). As other officers responded to Hooker Street, Sergeant Jones looked for the individual on the Dick and Willie Trail. (R. 3). Sergeant Jones encountered Hill, who was completely naked except for his shoes and socks. (R. 3). Hill fled down the Dick and Willie Trail, over a bank, and into an adjacent creek. (R. 3).

After being detained and read his *Miranda*<sup>1</sup> rights, Hill claimed that a "black male in a hoodie made him get naked and take pictures of himself." (R. 3). He was later transported to the hospital due to complaints of knee pain. (R. 3). While there, Hill gave another officer permission to view his camera roll and told them that he was alone when he took the photos of himself. (R. 3). There were several photographs of Hill naked around the city on his camera roll. (R. 3). Hill was later medically and psychologically cleared and released from the hospital. (R. 3).

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

Hill was arrested for indecent exposure, in violation of Code § 18.2-387. (R. 1). On December 21, 2018, after pleading not guilty, Hill was tried by the General District Court and found guilty as charged. (R. 2). On December 26, 2018, Hill timely appealed his GDC conviction for a trial *de novo* in the Circuit Court for the City of Martinsville. (R. 2).

On November 11, 2019, Hill filed a motion with the Circuit Court to “withdraw [his] [a]ppeal of the December 21, 2018, General District Court finding of guilty.” (R. 253–63). Hill specified that he was not “waiv[ing] his right to collaterally attack/challenge his conviction in General District Court” or his right to file a petition for a writ of actual innocence. (R. 254). Hill explained that he believed his “only chance to preserve his legal innocence [wa]s to withdraw his appeal in the Circuit Court, and just find another way to get a fair bench hearing to be found legally innocent of his state charge.” (R. 260). He stated that he “accept[ed] the conviction in the General District Court” but would “find other legal ways to overturn” his conviction. (R. 260). Therefore, he continued, he “has now accepted the fact that he will lose [on appeal] and so it is time to withdraw his appeal.” (R. 263). The court granted Hill’s motion and entered a final order re-instating the judgment of the GDC. (R. 264).



## II. Hill's previous failed attempts to collaterally attack his conviction.

Two weeks after his conviction, Hill filed a “Motion to Vacate Fraudulent Begotten Judgment.” (R. 268–94). In it, Hill contended that the trial court “lacked jurisdiction to put [him] in a position to withdraw[] [his] appeal after [he] had filed the *pro se* motion to dismiss based upon his legal innocence as a matter of law.” (R. 268). He contended that he “never signed any papers agreeing to automatically enter in a plea of guilty and was not advised by his lawyers that withdrawing the appeal would automatically enter in a plea of guilty.” (R. 269). Hill also contended that fraud had been perpetrated on the Circuit Court because he had served his motion to dismiss, a petition for writ of habeas corpus, and his motion to withdraw his appeal on the Commonwealth’s Attorney. (R. 269–70). Hill contended it was fraud upon the court to affirm his conviction in light of his motion to dismiss. (R. 269–71). In the motion, Hill did not assert that the trial court erred in granting his *pro se* motion to withdraw his appeal. (*See* R. 270–71). The trial court denied the motion on November 25, 2019. (R. 295).

Hill noted two appeals of that order. (R. 296–301). Both appeals were dismissed by this Court. *Brian Hill v. Commonwealth*, Rec. Nos. 0128-20-3 & 0129-20-3 (Va. Ct. App. July 31, 2020).

Over the next year, Hill challenged his conviction in the trial court four more times on similar grounds. Each time the trial court denied his motion and Hill

appealed to this Court. Each time, this Court rejected Hill’s arguments. *Hill v. Commonwealth*, Rec. Nos. 0578-20-3, 0657-20-3, 1294-20-3, and 1295-20-3. Hill also challenged his conviction via a petition for a writ of habeas corpus in the Western District of Virginia. That challenge was dismissed because Hill was no longer in custody when he filed it. *See Hill v. Commonwealth*, Case No. 7:22-cv-336, ECF No. 10 (W.D. Va. Aug 1, 2022). Hill also filed a petition for a writ of actual innocence in this Court, which was dismissed because he was not convicted of a felony. *Hill v. Commonwealth*, Rec. No. 0173-22-3, at 2 (Va. Ct. App. March 1, 2022) (slip op.).

### **III. Hill’s first and second pending appeals.**

On January 20, 2021, Hill filed a “Motion for Judgment of Acquittal . . .” in the Circuit Court. (R. 998–1278). Broadly speaking, Hill’s contentions could be categorized in one of three categories. First, Hill contended that on the day of the incident he was suffering from carbon monoxide poisoning, which would tend to negate his intent. (R. 1027–30). Second, Hill contended that the Commonwealth committed *Brady*<sup>2</sup> violations because it purportedly destroyed body camera footage of his arrest and vials of his blood that were drawn at the hospital, which could have supported his theory of innocence. (R. 1013–35). Lastly, Hill noted that newly enacted Code § 19.2-271.6 would allow presentation of evidence that he suffers from

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<sup>2</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

autism spectrum disorder and obsessive-compulsive disorder to argue he lacked the requisite intent. (R. 1000–03).

Based on those claims, Hill sought two remedies. First, he asked the Circuit Court to impose sanctions on the Commonwealth’s Attorney. Second, Hill asserted that he was entitled to either a judgment acquitting him of his indecent exposure conviction, a new trial, or a writ of actual innocence. (R. 1039–40).

On February 10, 2021, the Circuit Court denied Hill’s motion. The Circuit Court interpreted Hill’s motion as a petition for a writ of actual innocence. (R. 1519). It then held that it lacked subject matter jurisdiction over petitions for actual innocence and directed Hill to file it in this Court because this Court has original jurisdiction for non-biological petitions for a writ of actual innocence. (R. 1519).

On February 11, 2021, Hill filed a nearly identical motion. The only pertinent difference in the text of the motions is that any mention of a “writ of actual innocence” was replaced with a request for a new trial. (*Compare* R. 998–1278 *with* R. 1849–2219). The motion otherwise asserted the same claims and requested the same remedies.

On February 22, 2021, the Circuit Court denied Hill’s second motion. The circuit court again determined that it lacked jurisdiction to entertain the motion.

However, it did not specify in that order that it interpreted the motion as a petition for a writ of actual innocence. (R. 2236).

Hill separately appealed the denial of both his January 20 and February 11 motions. Briefing in those matters has been completed and they remain pending before this Court. *See Hill v. Commonwealth*, Rec. No. 0289-22-3 & 0290-22-3.

#### **IV. Hill’s third and fourth pending appeals.**

On August 28, 2022, Hill filed a “Motion for Judgment of Acquittal or New Trial Pursuant to Rule 3A:15 . . . .” (R. 2353–2746). This motion was, for all intents and purposes, the same motion he filed on January 20 and February 11, 2021.

Broadly speaking, Hill’s contentions could be summed up as an assertion that the Commonwealth could not have legally convicted him of indecent exposure without proof that he was “medically cleared” the evening of his arrest. However, Hill breaks that argument into three parts. First, he asserts that without some type of medical clearance, the Commonwealth could not charge him with indecent exposure arising from a “medical emergency.” (R. 2369). In this section, Hill re-iterates his claims of *Brady* violations because the hospital allegedly destroyed vials of blood that were drawn which allegedly could have proven his carbon monoxide claims. (R. 2365–69). Second, Hill asserts that without “medical clearance” from the hospital on the night of his arrest the Commonwealth could not prove intent. (R. 2394–95). Specifically, he argues that “intent cannot be proven

until there is 100% undeniable proof that [Hill] was medically cleared and lab results should have shown completely clean results of no drugs or gas poisonings before he was arrested for indecent exposure.” (R. 2394). Thirdly, Hill contends that “because [he] was not truly medically cleared, he cannot be obscene and wasn’t in his medical capacity or even mental capacity to even have his behavior construed as to any obscenity if it even exists which it does not.” (R. 2397).

Hill then pre-emptively argued that the trial court had subject matter jurisdiction to entertain his motion. In it, Hill asserted that “Rule 1:1 does not bar reopening a final criminal judgment or conviction of a case where new evidence is filed[.]” (R. 2400). Hill argued that the standards set forth in *Odum* and *Tweed* control and operate as an exception to Rule 1:1. (R. 2402); *Commonwealth v. Tweed*, 264 Va. 524, 527, 570 S.E.2d 797, 799 (2002); *Odum v. Commonwealth*, 225 Va. 123, 128–29, 301 S.E.2d 145, 147–48 (1983). He further contended that Rule 3A:15 enables a court to enter a judgment of acquittal or order a new trial even beyond the 21-day window of Rule 1:1. (R. 2400–01).

On the same day, Hill filed a “Motion requesting Commonwealth Attorney respond [to his claims].” (R. 2346–51). Without explaining why, Hill asserted that he was “entitled to a response from the Commonwealth Attorney over this 3rd motion for new trial or judgment of acquittal.” (R. 2347). In the motion, Hill sought a court order requiring the Commonwealth’s Attorney to respond. (R. 2348).

On September 4, Hill filed another pair of similar motions. (R. 2759–64 and 2765–3488). In this “Motion for judgment of acquittal or new trial pursuant to Rule 3A:15. . .”, Hill re-iterated his previous claims that an employee of The Chimney Sweep company improperly sealed the top of his chimney with tin, causing him prolonged exposure to carbon monoxide gas that was unable to vent when he used his fireplace. The majority of the motion attempts to establish that he was suffering from carbon monoxide poisoning on the night he was arrested due to the alleged negligence of an employee of the Chimney Company. (R. 2790–2813). Hill then asserts that because he was allegedly suffering from carbon monoxide poisoning on the night of his arrest that he lacked the requisite intent to be convicted for indecent exposure. (R. 2813–14). Lastly, Hill repeated his pre-emptive arguments raised in his previous motion as to why the trial court had jurisdiction. (R. 2817–22).

The same day, Hill also filed a “Motion requesting Commonwealth Attorney respond [to his claims].” (R. 2759–64). In it, he again argued that he was entitled to a response from the Commonwealth’s Attorney and requested that the trial court order a response. (R. 2760–61). The trial court denied Hill’s motions on September 7 and 13, 2022, respectively. (R. 3489, 3490).

Hill noted an appeal to both of those orders. (R. 3494–3514; 3517–42). Briefing in those matters has been completed and they remain pending before this Court. *See Hill v. Commonwealth*, Rec. No. 1424-22-3 & 1425-22-3.

## V. Hill's fifth, sixth, and seventh appeals.

On January 26, 2023, Hill filed a motion to set aside his conviction. (R. 3543–4008). Hill purported to base his motion on Code § 8.01-428(A), (B), and (D). Mimicking arguments from the Commonwealth's prior briefs, he notes that claims of fraud or clerical errors raised via Code § 8.01-428 are a limited exception to Rule 1:1. (R. 3554–57).

His claims of fraud and clerical errors, however, merely recycled his prior arguments. Hill argued that he was not psychologically or medically cleared the evening of his arrest. (R. 3558–60, 3585–88, 3592–3621). He contended that police inadequately investigated why he was naked the night of his arrest. (R. 3564–68). He repeated his contention that the Commonwealth committed *Brady* violations when the body camera recording of his arrest was deleted at the end of its retention period. (R. 3568–81). Hill claimed that the arresting officer later stated—in a separate federal proceeding—that he was “not being obscene” the night of his arrest. (R. 3582–85). He further argued that the prosecutor violated rules of professional responsibility in prosecuting him. (R. 3588–92).

Hill contended that those purported facts demonstrated fraud and, therefore, required his conviction to be set aside under Code § 8.01-428. (R. 3628–40). Hill acknowledged that a judgment can only be set aside under Code § 8.01-428 for extrinsic fraud, not intrinsic fraud. (R. 3556–57). He also tacitly acknowledged that

his claims only involved intrinsic fraud. (*See* R. 3560–61). Nonetheless, he argued that he received inadequate assistance of counsel and, therefore, the trial court should “consider the intrinsic fraud as extrinsic fraud.” (R. 3561).

The trial court denied Hill’s motion on February 14, 2023. (R. 4120). On February 17, 2023, Hill moved the trial court to reconsider its judgment. (R. 4148–4254). The trial court denied Hill’s motion to reconsider the same day. (R. 4255). On February 20, 2023, Hill filed additional documentation for his motion for reconsideration which he claimed to have inadvertently omitted. (R. 4257–76). The trial court entered a second order denying his motion for reconsideration on February 21, 2023. (R. 4277). Hill noted appeals of all three orders on February 21. (R. 4278–4327).

In his notices of appeal, Hill accused the circuit court judge of ethical violations, fraud, colluding with the Commonwealth’s Attorney to obstruct justice, and being part of a RICO<sup>3</sup> conspiracy to infringe his rights. (R. 4282–87; 4296–4301; 4317–22). Shortly after, the Circuit Court issued a show cause, charging Hill with contempt and appointed him counsel. The contempt charges were dismissed on joint motion of the Commonwealth and Hill on October 23, 2023. Upon information and belief, Hill agreed during the pendency of those contempt

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<sup>3</sup> Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1961, *et seq.*



charges not to file any new motions in the Circuit Court. That agreement did not prohibit his from filing anything in this Court.<sup>4</sup>

On February 27, 2023, Hill filed a motion in this Court requesting that his seven appeals be stayed. On March 9, 2023, Hill filed a separate motion requesting a one-year extension of time to file his opening briefs in his fifth, sixth, and seventh appeals. The basis for each motion was Hill's assertion that he did not believe he was allowed to file anything in this Court due to his pending contempt charges. This Court denied both motions on March 29, 2023.

On May 19, 2023, the Commonwealth moved to consolidate Hill's seven pending appeals. On June 30, 2023, this Court granted that motion and consolidated the seven cases<sup>5</sup> "for all purposes."

On December 1, 2023, Hill filed his untimely opening brief in his fifth, sixth, and seventh appeals. The Commonwealth submits the instant brief in response to the arguments raised therein.

### **STANDARD OF REVIEW**

This Court reviews the denial of a motion under Code § 8.01-428 for abuse of discretion. *Spanos v. Panos*, Rec. No. 0719-22-2, 2023 WL 3183603, 2023 Va. App.

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<sup>4</sup> Undersigned counsel confirmed this fact with Hill's appointed counsel in his contempt case during the pendency of those proceedings.

<sup>5</sup> Record Numbers 0289-22-3, 0290-22-3, 1424-22-3, 1425-22-3, 0313-23-3, 0314-23-3, and 0317-23-3.

LEXIS 267, at \*4 (May 2, 2023)<sup>6</sup>; accord *Rose v. Jaques*, 268 Va. 137, 159, 597 S.E.2d 64, 76–77 (2004) (noting in another context that setting aside a verdict “is an exercise of the inherent discretion of the trial court.”). To the extent required in this case, matters of statutory interpretation are reviewed *de novo*. *Graves v. Commonwealth*, 294 Va. 196, 199, 805 S.E.2d 226, 227 (2017).

## ARGUMENT

### I. The trial court was correct to deny Hill’s motions.

In eight assignments of error, Hill argues that the trial court erred in denying his motion to set aside his conviction pursuant to Code §§ 8.01-428(A), (B), and (D). He asserts that the trial court erred by ignoring his evidence, failing to hold an evidentiary hearing, failing to charge a Commonwealth’s Attorney with contempt, and failing to grant his motion based solely on his statement of facts. Hill is incorrect. He failed to plead an independent action or establish a *prima facie* case of fraud. Similarly, he failed to establish any clerical error or default judgment.

#### A. Hill failed to properly invoke Code §§ 8.01-428(A) or (B).

Hill argues that the trial court erred in not setting aside his conviction pursuant to Code §§ 8.01-428(A) and (B). However, he presents no basis upon which to invoke subsections (A) or (B). Code § 8.01-428(A) provides a mechanism for

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<sup>6</sup> Citations to unpublished opinions are permitted as persuasive authority. Rule 5A:1(f).

litigants to seek relief from a default judgment in certain circumstances. There was no default judgment in this criminal case—nor does Hill claim there was. Similarly, Code § 8.01-428(B) provides a mechanism for trial courts to correct clerical errors in judgments.<sup>7</sup> Yet, Hill alleges no clerical errors in his case. Accordingly, Hill’s motions failed to properly invoke Code §§ 8.01-428(A) or (B). Therefore, the trial court was correct to deny the motions on those grounds.

**B. Hill failed to plead a viable case under Code § 8.01-428(D).**

Although not yet determined by this Court, the Commonwealth assumes—without conceding—that Code § 8.01-428(D), which permits a party to move to set aside a judgment for fraud upon the court, applies in criminal cases. *See Wilson v. Commonwealth*, 108 Va. Cir. 97, 101–02 (Fairfax Cir. Ct. Apr. 20, 2021) (Ortiz, J.) (holding that Code § 8.01-428(D) applies in criminal proceedings); *cf Lamb v. Commonwealth*, 222 Va. 161, 165, 279 S.E.2d 389, 392 (1981) (holding that Code § 8.01-428(B) applies in criminal cases and noting that the text of Code § 8.01-428 does not limit its applicability to civil cases as its statutory predecessors did);

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<sup>7</sup> That mechanism runs parallel to a writ of error *coram vobis* pursuant to Code § 8.01-677. In his prior motions, Hill attempted to invoke that section as well. To extent that Hill’s brief can be read to allege any clerical error, the Commonwealth’s prior arguments on brief regarding Code § 8.01-677 are equally applicable. The only “factual errors” he feasibly asserts are ones regarding whether he possessed the requisite intent and culpability on the evening of his naked galivant through the city. Those facts, however, were plainly litigated in his underlying trial and, therefore, are not factual errors “arising from oversight or from an inadvertent omission.” Code § 8.01-428(B).

*but see Turner v. Commonwealth*, 90 Va. Cir. 322, 322–25 (Norfolk Cir. Ct. June 12, 2015) (opining in dictum that Code § 8.01-428(D) does not apply in criminal proceedings because there is no equity jurisdiction in criminal proceedings).

Hill’s claim that his conviction was procured by fraud upon the trial court ostensibly falls within the general framework of a motion under Code § 8.01-428(D). However, Hill has failed to properly plead a claim under Code § 8.01-428(D) for two reasons. First, he failed to institute an independent action. Second, he failed to plead a *prima facie* case of extrinsic fraud.

***1. Hill failed to institute an independent action as required.***

Code § 8.01-428(D) preserves “the power of the court to entertain at any time an *independent action* to relieve a party from any judgment or proceeding.” (emphasis added). However, “[t]his provision<sup>8</sup> cannot form the basis for setting aside” a judgment on the defendant’s motion. *Basile v. American Filter Service, Inc.*, 231 Va. 34, 37, 340 S.E.2d 800, 802 (1986); *accord Sauder v. Ferguson*, 289 Va. 449, 459 n.5, 771 S.E.2d 664, 670 n.5 (2015). Code § 8.01-428(D) “has been construed narrowly in the interest of finality of judgments and certainty of results.” *Basile*, 231 Va. at 37, 340 S.E.2d at 802. Therefore, Hill “may invoke this provision

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<sup>8</sup> When *Basile* was decided current subsection (D) was codified as subsection (C). In 1993, the General Assembly added current-subsection (C) and moved the relevant provision to subsection (D). *See* 1993 Va. Acts 1951.

. . . only by instituting an ‘independent action,’ not by a motion filed as part of the cause in which the judgment order was entered.” *Id.*

Thus, to the extent Hill attempts to invoke Code § 8.01-428(D), Hill could only properly do so by instigating a new, independent action. However, Hill did not file a new, independent action. Instead, he attempted to make his claim via motion—exactly what precedent prohibits. *Id.*

Much as a person cannot make a ‘motion for a writ of habeas corpus,’ Hill cannot file a motion alleging fraud under Code § 8.01-428(D). *Id.* In both circumstances, a new, independent civil action at law is required. Therefore, Hill’s contentions that his criminal conviction is based upon fraud are not cognizable as filed and the trial court correctly denied Hill’s motions. *Id.*

## ***2. Hill failed to plead a prima facie case of extrinsic fraud.***

Even if Hill were able to raise a fraud claim under Code § 8.01-428(D) via a motion, he fails to allege facts sufficient to establish a *prima facie* claim. “Generally, a judgment or decree rendered by a court having jurisdiction over the parties and subject matter must be challenged by direct appeal and cannot be attacked collaterally.” *Peet v. Peet*, 16 Va. App. 323, 327, 429 S.E.2d 487, 490 (1993). The exception is judgements that are void *ab initio*, which can be challenged at any time. *Id.*

A judgment obtained by extrinsic fraud is void *ab initio* and can, therefore, be challenged at any time pursuant to Code § 8.01-428(D). *Id.* However, “a judgment obtained by ‘intrinsic fraud’ is merely voidable and can be challenged only by direct appeal or by a direct attack in an independent proceeding.” *Id.* Accordingly, even if Hill could present his fraud claim by motion, that claim would only be cognizable if it established a *prima facie* showing of *extrinsic* fraud.

Extrinsic fraud is “conduct which prevents a fair submission of the controversy to the court.” *Id.* (quoting *Jones v. Willard*, 224 Va. 602, 607, 299 S.E.2d 504, 508 (1983)). Extrinsic fraud includes: “[k]eeping the unsuccessful party away from the court by a false promise of a compromise, or purposely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party[] and connives at his defeat.” *McClung v. Folks*, 126 Va. 259, 279, 101 S.E. 345, 348 (1919); *accord F.E. v. G.F.M.*, 35 Va. App. 648, 660, 547 S.E.2d 531, 537 (2001). In such circumstances, the fraud perpetrated “prevents the court or non-defrauding party from discovering the fraud through the regular adversarial process.” *F.E.*, 35 Va. App. at 660, 547 S.E.2d at 537 (quoting *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490). “Extrinsic fraud, therefore, is ‘fraud that . . . deprives a person of the opportunity to be heard.’” *Id.* (quoting *Hagy v. Pruitt*, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (S.C. 2000)).

Intrinsic fraud, on the other hand, “includes perjury, use of forged documents, or other means of obscuring facts presented before the court and whose truth or falsity as to the issues being litigated are passed upon by the trier of fact.” *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490. “A collateral attack on a judgment procured by intrinsic fraud has been deemed not warranted because the parties have the opportunity at trial through cross-examination and impeachment to ferret out and expose false information presented to the trier of fact.” *Id.*

Here, Hill alleges that the Commonwealth committed fraud during his trial by purportedly destroying body camera footage of his arrest.<sup>9</sup> He further claimed that he was not psychologically or medically cleared the evening of his arrest. (R. 3558–60, 3585–88, 3592–3621). He contended that police inadequately investigated why he was naked the night of his arrest. (R. 3564–68). Hill claimed that the arresting officer later stated—in a separate federal proceeding—that he was not obscene the night of his arrest. (R. 3582–85). He further argued that the prosecutor violated rules of professional responsibility in prosecuting him. (R. 3588–92).

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<sup>9</sup> Notably, the body camera footage was only deleted at the end of its retention period and only because neither party identified those videos as being needed in Hill’s case. If either party had, the videos would have been retained indefinitely. (R. 4093–95). Contrary to Hill’s assertions, that did not violate the discovery orders in his case that required the Commonwealth to “permit counsel for [Hill] to inspect and copy” pertinent evidence. (R. 3922, 3924, 3927).

Even *if* those allegations were accurate,<sup>10</sup> they do not allege extrinsic fraud. Indeed, most claims regarding the adequacy of an investigation or adherence to professional ethics do not even raise the specter of fraud. Even to the extent that Hill’s claims could be viewed as alleging fraud, they would constitute, at most, *intrinsic* fraud because they would be a means of obscuring the facts presented to the trier of fact. *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490.; *see also Rock v. Commonwealth*, Rec. No. 1119-21-2, 2022 WL 4828702, 2022 Va. App. LEXIS 481, at \*8 (Va. Ct. App. Oct. 4, 2022) (“Appellant’s allegations of prosecutorial misconduct and perjured testimony demonstrate, at most, intrinsic fraud as they are ‘means of obscuring facts presented before the court.’”) (quoting *Peet*, 16 Va. App. at 327, 429 S.E.2d at 490). Therefore, Hill’s allegations are insufficient to establish the necessary *prima facie* case of *extrinsic* fraud.

Recognizing as much, Hill makes several futile attempts to recast his claims as extrinsic fraud. For instance, he claims that (1) destruction of the body cam videos would have exposed the police chief to liability and (2) the “liability issues” turns what would be intrinsic fraud into extrinsic fraud. (Appellant’s Br. 20–21). He also claims that the purported fraud must have been extrinsic because there was no proof

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<sup>10</sup> The Commonwealth does not concede that Hill’s allegations are accurate. However, it accepts Hill’s allegations as pleaded for the sole purpose of testing whether they establish the requisite *prima facie* claim of extrinsic fraud.



that it happened until he filed his February 10, 2023, motion.<sup>11</sup> (Appellant’s Br. 16). These assertions have been made without any legal support and strain logic beyond the breaking point. Moreover, they were not raised in his motions below and are, therefore, procedurally defaulted pursuant to Rule 5A:18.

Hill has seemingly abandoned the only argument he raised below as to why the purported fraud was extrinsic. In his motion, Hill tacitly acknowledged that his claims only involved intrinsic fraud. (*See* R. 3560–61). Nonetheless, he argued that he received inadequate assistance of counsel and, therefore, the trial court should “consider the intrinsic fraud as extrinsic fraud.” (R. 3561). Of course, the adequacy of his counsel would have no logical connection to the type of fraud he alleges that the Commonwealth committed. Moreover, to the extent that Hill’s primary complaint is the adequacy of the representation he received, he was required to raise that complaint in his prior habeas proceedings. *See Kenner v. Commonwealth*, 71 Va. App. 279, 297, 835 S.E.2d 107, 116 (2019) (claims of ineffective assistance of counsel must be raised through a petition for a writ of habeas corpus).

In sum, Hill fails to allege any extrinsic fraud. The failure to do so is fatal to his claim. Therefore, the trial court was correct to deny his motions.

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<sup>11</sup> That argument seemingly ignores the fact that he has claimed to have proven the purported fraud in each of his previous motions and appeals. *See Hill v. Commonwealth*, Rec. Nos. 0289-22-3, 0290-22-3, 1424-22-3, 1425-22-3.

## CONCLUSION

For the reasons stated, the Commonwealth asks that this Court affirm the judgment of the Circuit Court for the City of Martinsville.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA  
Appellee herein.

By: \_\_\_\_\_ /s/  
Counsel

Jason S. Miyares  
Attorney General of Virginia

Justin B. Hill  
Assistant Attorney General  
Virginia State Bar No. 93564

Office of the Attorney General  
202 North Ninth Street  
Richmond, Virginia 23219  
Phone: (804) 786-2071  
Fax: (804) 371-0151  
Email: [oagcriminallitigation@oag.state.va.us](mailto:oagcriminallitigation@oag.state.va.us)

## CERTIFICATE OF TRANSMISSION AND SERVICE

On December 2, 2023, the required copies of this brief were filed electronically with this Court in compliance with Rule 5A:1(c)(1) and a copy was mailed to Brian David Hill, appellant, *pro se*, at 310 Forest Street, Apartment 2, Martinsville, Virginia 24112.

In accordance with Rules 5A:4(d) & 5A:20(h), I certify that this document contains 4,860 words, in compliance with Rule 5A:19(a).

The Commonwealth waives oral argument.

By: \_\_\_\_\_ /s/  
Justin B. Hill  
Assistant Attorney General